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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*, *Petitioners*,
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

HANNA PERKINS SCHOOL, *et al.*, *Petitioners*,
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

SENEL HERMAN TAYLOR, *et al.*, *Petitioners*,
v.
DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE CENTER FOR INDIVIDUAL FREEDOM, CATO INSTITUTE, MILTON AND ROSE D. FRIEDMAN FOUNDATION, AND GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Freedom is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association and religious freedoms. Of particular importance to the Center in this case are constitutional protections for the free exer-

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

cise of religious choice, and the constitutional requirement of the religion-neutral provision of public benefits, including publicly funded education.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case raises squarely issues of increased choice in the educational marketplace and the interaction of First Amendment Establishment Clause and Free Exercise values and thus is of central interest to Cato and the Center.

The Milton and Rose D. Friedman Foundation, established in 1996, is dedicated to promoting public understanding of the need for major reform in K-12 education, specifically highlighting the role that competition through educational choice plays in achieving that reform. For nearly 50 years, Milton and Rose Friedman have argued that in order to improve substantially the quality of education in America all parents need to have a truly free choice of the schools that their children attend. Through its publications, research, and public information campaigns, the Friedman Foundation seeks to advance this vision of individual liberty via free educational markets. As the instant case raises squarely the rights of low-income parents in Cleveland to make a free choice of schools, including religious schools, it is of critical interest to the Milton and Rose D. Friedman Foundation.

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of free market public policy. Through its research papers, editorials, and policy briefings, the Institute advocates public policy founded upon the principles of limited government, economic freedom and individual responsibility. Central to the mission of the Goldwater Institute is studying and promoting school choice options for parents. The instant case raises squarely the issue of whether a program designed to rescue economically disadvantaged students from a failing public school system by providing scholarships that parents may use to choose private, religious or public schools violates the First Amendment and thus is of vital interest to the Goldwater Institute.

SUMMARY OF ARGUMENT

1. When evaluating facially neutral laws that allow benefits to flow on equal terms to secular and religious institutions and that do not create excessive government entanglement with religion, the touchstone of Establishment Clause analysis should be whether the flow of benefits is mediated by genuinely independent private choice. Such private choice breaks the nexus between government decisionmaking and any benefits to religious institutions that may result as a secondary consequence of private decisions on how to use government benefits.

2. In order to determine whether the Ohio voucher program allows for genuinely independent private choice, it must be evaluated in the context of the full range of publicly funded educational alternatives available to the parents of Cleveland schoolchildren. Consideration of publicly funded secular alternatives such as public schools with tutoring, magnet schools, and community schools places context around any decision by a parent to select a religious school participating in the voucher program and demonstrates the independence of that choice by showing that numerous secu-

lar alternatives were available to that parent on equal or better terms. Such competing secular alternatives also provide a baseline from which to measure whether the voucher program is affirmatively advancing or endorsing religious schooling, or instead simply moving it closer to equal treatment with secular educational options. In questions regarding the existence of choice and alleged favoritism, an accurate and complete context is essential.

3. The numerous publicly funded secular options available to Cleveland parents for educating their children establish that their choices under the voucher program are genuinely independent of any pressure to favor religion. If anything, parents are provided precisely the opposite incentives, through programs that provide greater funding for secular educational alternatives than the funding provided under the voucher program. That many of the parents participating in the voucher program have selected religious schools for their children merely reflects their private decisions and does not cause the program to violate the Establishment Clause.

4. The school participation and other criteria defining the voucher program do not discriminate in favor of religious schools. Those criteria are facially neutral and serve valid public goals concerning the affordability of educational options under the voucher program and the desire to enhance the return on government funds by requiring participating schools to limit the tuition they will charge voucher students as a means of having them contribute to the expense of educating those students. Neither a high percentage of participating religious schools nor a high percentage of voucher students attending such schools supports the inference that the criteria for the program are non-neutral. Those outcomes are a function of the private choices of educational institutions as well as of Cleveland parents selecting such schools. The suggestion that the low dollar amount of the vouchers and the tuition cap on participating schools favors religious schools with supposedly lower costs and greater resources than secular

schools misunderstands the economics of education and rests on speculative facts. The supposed bias of a government program that validly encourages private contributions to the public goal of education is no more than one that may favor wealthy institutions in general, without regard to their religious or secular identity. The low funding amounts in the voucher program in fact treat religious institutions worse than private secular institutions, which are eligible to participate in better-funded programs that compete with vouchers in providing publicly funded educational alternatives for Cleveland students. The voucher program thus merely adds a small improvement over the complete lack of such funding and is a first step in the direction of neutrality, not a violation of the Establishment Clause.

ARGUMENT

The central issue in this appeal is whether and to what extent school selection by parents under the Ohio voucher program is a product of genuinely independent private choice. State creation of such private choice does not offend the Establishment Clause regardless of whether the individual exercise of such choice results in greater or lesser attendance at religiously oriented schools. As in so many areas of constitutional law, ranging from free speech to equal protection, the fundamental requirement is an equality of opportunity, not a pre-ordained outcome. Where private choice is exercised in the face of such opportunity, the nexus between government support and the ensuing results is broken and the final distribution of the results of such choices cannot be attributed to the government.

I. GENUINE PRIVATE CHOICE BETWEEN THE SECULAR AND THE RELIGIOUS SATISFIES THE ESTABLISHMENT CLAUSE.

As the court of appeals recognized, this case hinges upon whether the Ohio voucher program has the principal or primary effect of advancing or inhibiting religion. *Simmons-Harris* v. *Zelman*, 234 F.3d 945, 951 (CA6 2000); *id.* at 966 (Ryan, J, concurring in part and dissenting in part). In this case the "primary effect" issue turns mainly on whether any state funds ultimately reaching religious schools flow to them "'only as a result of the genuinely independent and private choices of aid recipients.'" *Simmons-Harris*, 234 F.3d at 955 (*quoting Witters* v. *Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 488 (1986)); *see also*, *Agostini* v. *Felton*, 521 U.S. 203, 225-26 (1997) (direct aid to religious schools valid where money flows to schools as a result of "'genuinely independent and private choices of' individuals").

Private choice is critical to Establishment Clause analysis because it breaks the nexus between the government support and the ensuing results. In *Witters*, for example, this Court upheld the use of a vocational tuition grant by a person who chose to attend a Christian college to become a pastor, missionary, or youth director. 474 U.S. at 487. Because it was the *student's* educational choice to seek sectarian education with the funds made available to him, there was no Establishment Clause violation. That choice made the tuition payment "no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution." *Agostini*, 521 U.S. at 226 (discussing *Witters*). Likewise in *Zobrest* v. *Catalina Foothills School District*, even though the state-provided sign language interpreter would be translating expressly religious instruction at a religious high school, the interpreter's activity was the "result of the private decision of individual parents" and could not be "attributed to state decisionmaking." 509 U.S. 1, 10 (1993).

Interjecting private choice between the government decision to subsidize education for a class of students and the final parental decisions of which schools their children will attend, eliminates both the perception and the reality of any *government* decision to advance or inhibit any religious educational option. The government merely supports educational choice. The ensuing choices that result are then attributable to the parents and students, not to the government.

The private locus of decisionmaking is important to Establishment Clause analysis because it constrains the government's ability to use its program for improper purposes. *Mitchell* v. *Helms*, 500 U.S. 739, 810 (2001) (Thomas, J., plurality) ("if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment"). A multitude of private choices regarding which schools students will attend is the antithesis of monolithic government support for a favored religion that the Establishment Clause was meant to guard against. Private decisionmaking also shifts the "attribution" of any decision to pay religious school tuition to the parents choosing that school for their child, and away from the government. Such shifted attribution reflects the reality of the decisionmaking and furthers the additional Establishment Clause goal that government not engage in symbolic endorsement of or opposition to religion. *Witters*, 474 U.S. at 493 ("The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.").

In cases involving intervening private choice and where there is no issue of entanglement, the only remaining Establishment Clause analysis is whether those decisions that the government does make – eligibility criteria for students and schools and other parameters of government educational

funding – themselves discriminate in favor of or against religion. *Agostini*, 521 U.S. at 231 (an incentive for religious indoctrination "is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion."). But where the criteria defining the available choices of publicly funded education are neutral toward religion, parents' choice of a religious school for their child is the result of a "genuinely independent" private choice and there is no Establishment Clause violation.

II. VOUCHERS MUST BE EVALUATED WITHIN THE FULL CONTEXT OF STATE-FUNDED EDUCATIONAL OPTIONS.

In considering whether genuinely independent private choice existed in this case, the Sixth Circuit looked only to the choices provided parents by the voucher program itself, and ignored the variety of other state-funded educational options that also were open to parents eligible for the voucher program. 234 F.3d at 958 (refusing to examine entire context of Ohio education and other options available to Cleveland parents). But it is impossible to evaluate the genuineness or independence of educational choices being made by parents in Cleveland without looking at the full range of state-funded options from which such parents are choosing.

When considering where to send their children to school, Cleveland parents have a variety of state-funded educational options. Most obvious (though perhaps least desirable) is the local public school option. Parents selecting that option effectively direct over $7000 per pupil of state funds to the secular education of their children, and may obtain additional voucher program funds for supplemental private tutoring of their children. Parents whose children qualify also may elect to send their children to public magnet schools, again directing over $7000 dollars per pupil of state funds to a secular

educational alternative. Petition for a Writ of Certiorari, *Taylor* v. *Simmons-Harris*, No. 00-1779, at 4 (May 25, 2001) ("Taylor Pet."). Over 16,000 Cleveland students attended magnet schools during the 1999-2000 school year. *Id.*

Parents dissatisfied with traditional public school options may instead elect to send their children to publicly funded Community Schools (often called "charter schools"), which provide greater educational autonomy. Students at Community Schools receive the benefit of over $4500 of state support, and over 2000 Cleveland students took advantage of this option in the 1999-2000 school year. *Id.* Interestingly, private secular schools are eligible to convert to Community Schools, and a number of schools in Cleveland made such a conversion. *Id.* at 19. Religious schools are not eligible to become part of the Community Schools program.

Finally, parents may select fully private schooling for their children, and through the Ohio voucher program receive up to $2250 from the State for tuition at any private school that meets the program's admissions, tuition, and other requirements. 234 F.3d at 948. Over 3700 students participated in the voucher program in the 1999-2000 school year. Taylor Pet., at 4. Both religious and secular schools have qualified for and have accepted students under the voucher program. *Id.*[2]

Parents in the Cleveland school district thus have a wide variety of state-funded educational choices for their children, and are entirely free to select among those choices.

The Sixth Circuit sought to justify its refusal to consider the full range of state-funded educational choices available to parents by claiming that reviewing the "entire context of Ohio

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[2] The voucher program also allows Cleveland students to attend public schools in adjacent school districts and provides voucher payments to such schools *in addition to* an "average daily membership" for each student of over $4200. Taylor Pet., at 3. However, no out-of-district public schools have elected to participate in the voucher program despite ample funding.

education" was not before the court and would require inappropriate consideration of legislative choice and educational policy. 234 F.3d at 958. The court also noted that the Community Schools program was contained in a separate chapter of the Ohio Code, makes no reference to the voucher program, and only the voucher program was challenged by the plaintiffs. *Id.*

But the court of appeals seems to have misunderstood the relevance of other state-funded educational options to its analysis of the voucher program. Both the independence of any private choice to send children to religions schools using vouchers and the overall primary effect of the voucher program in general, can only be determined in the full context of Cleveland's publicly funded educational system. It is impossible to say that the State somehow coerced parents into selecting religious schooling without knowing what other choices the State afforded to parents as alternatives. Likewise, it is impossible to conclude that the State is advancing or endorsing religious schools without measuring the State's conduct toward such schools against a proper baseline of state support for secular schools (both private *and* public).

Absent a proper baseline for evaluating state activity or parental choice, any state conduct that benefits religion – if viewed in isolation – could be said to advance or endorse religion. Likewise any religious educational alternative allowed to parents will always be viewed as evincing bias, rather than neutrality, if abstracted from the pre-existing context of numerous state-supported secular alternatives. But this Court's cases consistently recognize that the state is permitted to confer benefits on religious entities equal to the benefits it confers on similarly situated non-religious entities. *Mueller* v. *Allen*, 463 U.S. 388, 398-99 (1983) (upholding tax deduction that "neutrally provides state assistance to a broad spectrum of citizens"). Indeed, the state may be *required* to allow religious groups equal participation in programs and benefits available to comparable nonreligious groups. *See, e.g., Good*

News Club v. *Milford Central School*, -- U.S. --, 121 S. Ct. 2093, 2097 (2001) (exclusion of religious club from use of after-school facilities violates free speech rights and not justified by Establishment Clause concerns); *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (public university may not discriminate against student religious publication in distribution of student activity funds). Equality of treatment by the state and the genuine independence of parental choice can only be measured in the full context of the state-funded educational options available to Cleveland parents.

In this case, the comparison should extend to all publicly funded educational options, and not just those under the voucher program alone. The additional options are in fact competitive with each other, available for the parents to choose on equal or better terms than the options under the voucher program, and establish a pre-existing baseline of extensive state support for nonreligious educational alternatives. Public and Community School alternatives should be included among the alternatives evaluated for this additional reason: The dispute in this case turns on the allegation of preferential state *funding* in support of religious schooling, and has nothing to do with public versus private administration of the particular schools. With regard to state funding, such alternatives are quite comparable to the schools participating in the voucher program. Including them in the baseline thus properly informs any analysis of whether the voucher program's creation of a state-funded option to attend religious schools constitutes a late-coming move in the direction of equality or instead some improper favoritism.

Contrary to the Sixth Circuit's view, it and this Court are not being asked to evaluate the legality of educational options other than the voucher program, but rather to evaluate the voucher program itself in the *context* of those other options. Merely because the State has proceeded in steps – first providing support for nonreligious public and Community

School options – and has finally expanded its support to privately run educational options does not mean that the earlier options cease to exist or are not sufficiently equivalent to the new options added.[3] Those options do exist, and this Court should not close its eyes to the true range of choices offered by the State to Cleveland parents.

III. PARENTS HAVE GENUINE CHOICE BETWEEN RELIGIOUS AND NONRELIGIOUS SCHOOLS.

Considering the voucher program in its proper context as merely one element of a broader program of public support for education, it becomes apparent that parents have ample choice regarding whether to send their children to either religious or nonreligious schools.

At core, Ohio has said to Cleveland parents: We will devote public money to the education of your children; you pick the schools. Parents are free to select from a palette of alternatives including public, private, secular, and religious schools. They can send their children to the local public school or a public magnet school and receive the product of thousands of dollars per pupil of state educational support. They can seek private tutoring for their public school children, and receive additional voucher program funds for that purpose. They can send their children to Community Schools

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[3] As a simple example, if the State appropriated money to pave all of the streets in town except the ones in front of religious institutions, but the next year thought better of it and appropriated money to pave those remaining streets, the second appropriation, viewed in isolation from the previous year's activity, would surely seem like an advancement of religion. Recognizing the full context, however, would reveal a prior discrimination against religious institutions that was merely rectified by the subsequent appropriation, creating equal access for religious institutions to benefits that already existed for others. Likewise, pretending that a voucher program discriminates in favor of religious schools while ignoring the pre-existing and far greater state support for nonreligious educational alternatives turns the concept of discrimination on its head.

where they will receive a publicly supported education and benefit from thousands of dollars of per pupil expenditures. Or they can elect private school options and receive public funds to pay for the vast majority of the tuition. Among private schools they may select from a variety of choices including, in the 1999-2000 school year, 10 secular schools and 46 religious schools of various persuasions.

Among those various options open to Cleveland parents, there is absolutely no state pressure or incentive to select a religious school over a secular school. If anything, there is pressure in the opposite direction. Secular local public, magnet, and Community schools all receive far more state money per pupil and that money completely covers the students' tuition. The vouchers given to parents selecting private schools for their children, however, are thousands of dollars less per pupil than the amount expended on those other alternatives, and the parents still must pay 10 or 25 percent of the tuition.[4]

While it is true that of the private schools willing to participate in the voucher program religious schools outnumber nonreligious schools, that has no impact on the freedom or independence of the *parents'* choice. The ability to choose among 10 secular private schools in the 1999-2000 school year is hardly a trivial or illusory opportunity, regardless of how many religious schools were also available as options. There is no evidence that any parents under the voucher program preferring a secular private-school option have been thwarted in their choice. Indeed, Judge Ryan, in dissent below, noted the "indisputable fact that of *all* the * * * nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason." 234 F.3d at 969 (emphasis in original). From the parents' perspective, therefore, choice is abundant, and there are four

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[4] As between secular and religious private schools, of course, the voucher amounts are identical, again offering no pressure or incentive for the parents to choose a religious private school over a secular private school.

distinct categories of nonreligious publicly funded educational options from which to choose: local public schools with or without supplemental tutoring; magnet schools; Community Schools; and secular private schools. That participating private religious schools outnumber private secular schools under the voucher program does not deny or diminish the freedom parents have to choose a state-funded secular educational alternative.[5]

Even with the numerous secular options available to Cleveland parents, many in the voucher program have in fact elected to send their children to religious private schools using money provided under the voucher program. But that choice, and the flow of money resulting therefrom, is nothing other than a genuine and independent decision of private parents with ample alternative options. That such private choices result in greater or lesser attendance at religious schools in any given year does not impact the Establishment Clause analysis, much less demonstrate a constitutional violation. *See Agostini*, 521 U.S. at 229 (constitutionality of an aid program does not depend "on the number of sectarian school students who happen to receive the otherwise neutral aid"); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").[6]

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[5] It is also worth noting, as petitioners point out, that the proportions of secular and religious schools participating in the voucher program is somewhat misleading given that some secular private schools have taken advantage of the option to convert to Community Schools and obtain the higher tuition payments available under that program. Taylor Pet., at 19. Private religious schools do not have that option.

[6] It is a long-established principle in equal protection jurisprudence that a disparate impact alone does not demonstrate a constitutional violation. For example, in *Washington* v. *Davis*, this Court held that a facially neutral law would not be found unconstitutional "*solely* because it has a racially disproportionate impact." 426 U.S. 229, 239 (1976) (emphasis in original). Indeed, this Court went further and held that disproportional impact

IV. SCHOOLS HAVE NONDISCRIMINATORY ACCESS TO THE OHIO VOUCHER PROGRAM.

Given that there is no coercion on parents to select religious as opposed to secular education from *among* their various options, the only remaining issue is whether the structure of the voucher program itself seeks indirectly to pressure parents to prefer religious schools over secular schools.

After reciting the program's limited voucher amounts, tuition caps, and high percentage of religious schools among those participating, the Sixth Circuit opined that the

> idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program.

234 F.3d at 960. The court then concluded that the Ohio voucher "program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria," that it "has the primary effect of ad-

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alone would not even trigger "strict scrutiny." *Id.* at 242. Rather, the Court required demonstration of a purpose or intent to discriminate in order to establish an equal protection violation. *Id.*; *see also Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977) ("official action will not be held unconstitutional solely because it results in racially disproportionate impact"). The same principle should apply in Establishment Clause cases involving facially neutral statutes, particularly where, as here, there is no concern over entanglement (a concern somewhat unique to religion cases and lacking an analogue in Equal Protection jurisprudence). In essence, the religion clauses of the First Amendment combine to form a specialized equal protection clause designating religious viewpoint as a suspect category. *Cf. Agostini*, 521 U.S. at 232 (upholding program whose criteria "neither favor nor disfavor religion"). Given the functional equivalence of the religion clauses and the equal protection mandate, it is appropriate to look to equal protection jurisprudence for insight into how to handle facially neutral laws having allegedly disparate impacts.

vancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause." *Id.* at 961.

The court of appeals' contention that the participation criteria for schools is non-neutral is simply wrong as a facial matter. None of the criteria in any way makes reference to religion, except to the extent that they *forbid* discriminating against students on the basis of their religion – hardly an attempt to favor religious schools. As for the remaining criteria for participation, the State is certainly entitled to pursue goals unrelated to religion and to cabin various choices according to such separate goals.

In this case each of the participation criteria built into the voucher program serve palpably neutral and valid state goals. For example, participating private schools are required to be within the Cleveland school district and to meet the State's basic educational standards. 234 F.3d at 948. Those restrictions plainly serve secular purposes of convenience, physical accessibility, and quality education. Participating schools must likewise give priority to low-income voucher students and may not discriminate based on race, religion, or ethnicity. *Id.* at 949. Again, such restrictions serve the neutral secular goals of helping first those students most in need and of assuring nondiscrimination. Finally, participating schools must limit the total tuition charged to voucher students to no more than $2500, up to 90% of which can then be reimbursed through the voucher program. *Id.* at 948. That too furthers plainly secular goals of ensuring that such schools are affordable to the beneficiaries of the vouchers, preventing schools from simply raising their tuition by the amount of the voucher, and maximizing the return on the government's resources by requiring participating schools to absorb some of the cost of educating the voucher-eligible students.

While these various selection criteria certainly limit the schools that can participate in the program, and hence limit parents' choices of where to use their voucher funds, such

limits are facially neutral as between religious and secular school options, and do not vitiate the genuine independence of the private choices made within those limits.

Having no indicia of bias from the voucher program criteria themselves, the court of appeals sought to infer a lack of neutrality from the *outcome* of the private choices – by both parents and private schools – under the voucher program. But the court's inferences are both illogical and demeaning to the religious schools electing to participate and to the parents electing to send their children to those schools.

The inference of a lack of genuine choice from the high percentage of voucher-eligible schools that are religious is illogical in that it effectively denies the significant private secular choices under the voucher program and completely ignores the secular public and Community School choices available to parents. That there are a large variety of religious educational alternatives – presumably representing a variety of religious views – does not in any way deprive parents of their secular choices. More religious choices do not favor any given choice, particularly where there is no dispute that all parents seeking a secular education for their children can select one either within or without the voucher program. The assumption that the greater number of religious schools somehow pressures parents to select those schools denies the essential free will of the parents doing the choosing and assumes, without support, that they mindlessly or randomly select among private schools and hence are channeled to religious institutions by sheer probabilities. That view is not only illogical, it is fundamentally incompatible with the First Amendment, which necessarily assumes that individuals are capable of free choice and will choose – whether in matters of speech or religion – according to their own beliefs and intellects so long as they are presented with a choice.

The court of appeals' related inference of a biased design from the high percentage of voucher parents who in fact choose religious schools is also demeaning to those parents

because it assumes that such a choice could not possibly be genuine. It begs the underlying question by simply assuming that if there were only more secular private alternatives, those parents would surely change their selections. But just as we cannot assume that public employees providing remedial education services at religious schools will lose fidelity to their tasks and begin teaching religion, *Agostini*, 521 U.S. at 234, likewise we cannot assume that parents who desire a secular private education for their children will somehow lose control over their volition when confronted with numerous religious choices in addition to the many secular options that are available to them. Rather, this Court should assume that where secular options are available to parents on the same or better terms as religious options – as is the case here – a parent's choice of a religious school is genuine and independent and the burden should be on any challengers to prove otherwise.

The additional inference that high participation by religious schools demonstrates programmatic bias in favor of those schools is also illogical and is demeaning to the schools themselves. The voucher program pays a maximum of $2250 per student and requires participating schools to limit tuition for each voucher student to $2500. 234 F.3d at 948. The Sixth Circuit speculated that the tuition caps and limited reimbursement under the voucher program reflected an attempt to favor religious schools because such schools have lower operating costs and greater supplemental income from private donations than do private secular schools. 234 F.3d at 959.

The notion that a religious character gives an institution an inherent ability to educate at a lower price, and that the voucher program had the primary and intentional effect of using that differential ability to channel money to advance religion, is economically specious and politically speculative. There is no reason to believe, and none suggested, that the cost – in human time and material resources – of educating a child differs according to the religious orientation of a school. The number of teachers, books, and rooms needed to provide

an education meeting Ohio's standards would seem to be a constant across comparable populations of children.

As for the court's suggestion that religious schools have lower overhead costs, that argument confuses "cost," in an economic sense, with the means of paying for that cost. A religious school's overhead cost – in terms of the need for a building, administrative and janitorial services, and the like – is in all respects identical to the overhead cost of a secular school. What the court probably had in mind was that religious institutions running such schools may simply elect to use buildings they already own for school purposes, and thus can avoid expending current *cash* on providing a physical space for the school. But the fact that the overhead requirement is met using physical as opposed to monetary assets does not mean that it is costless. The economic cost is the same; it is merely the method of payment that is different.[7]

The court of appeals' reference to religious schools' supposedly greater supplemental income from private donations is likewise not an argument about differential educational costs, but rather about the differential ability to *pay* for such costs. Indeed, what it boils down to in the end is an argument about *wealth*: Because religious schools and their sponsoring institutions are supposedly richer – in physical, human, and financial assets – than secular schools and their patrons, they are said to be given preferential treatment by a voucher program that limits its payments and asks schools to share the costs of educating Cleveland students. Merely articulating the argument accurately should be sufficient to refute it.

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[7] The same point is true as to teachers who may come from within the religious institution itself rather than be hired externally. Such teachers represent human capital, and when an institution devotes such capital to the task of teaching, the diverted value of that activity, and hence the economic "cost" of such diverted resources, is no different than if those in charge simply hired teachers in the market and used their own human resources for other purposes creating value for the religious institution.

Aside from the fact that there is no evidence that religious schools and their patrons as a class are wealthier than secular schools and their supporters, it would not matter even if it were so. The government routinely adopts policies that discriminate in one way or another on the basis of wealth, and the fact that the rich and the poor, as classes, have very different racial makeups has never been sufficient to establish racial discrimination. Rather, the mere correlation between wealth and race, or here supposedly between wealth and religion, is just that, a correlation, and is not inherent to racial identity or religious belief. Given that lack of connection, even if the voucher program could be characterized as favoring wealthy schools that can contribute their own resources to the educational program, that is a perfectly valid secular goal regardless of the distribution of wealth across religious lines.[8]

What the voucher program ultimately does is create an incentive for charity among educational institutions. That religious institutions may be effective at generating and providing charity does not mean that all incentives for charity constitute an endorsement or advancement of religion. If that were so, then the tax deductibility of charitable donations would be invalid. But the Establishment Clause only bars government from directly favoring religion, it does not require government to affirmatively exclude religious institutions from facially neutral programs under which they might have greater success than secular institutions.

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[8] Of course, *amici* strongly question the assumption that religious educational institutions are categorically wealthier than secular institutions. Certainly at the university level, many of the very wealthiest institutions – such as the Ivy League schools – are quite secular and receive ample donations not from any sectarian sense of charity, but from institutional devotion and more universal charitable impulses. At the lower school levels, secular organizations – both public and private – are equally capable of seeking charitable contributions of time, buildings, and money in order to subsidize the education they provide and thus lower their nominal, if not their actual, "costs." Indeed, many do.

In the end, Ohio's support for various educational alternatives is facially neutral and shows no hidden scheme to advance or endorse religion. If anything, Ohio's educational policies continue, slightly mitigated, the disfavored treatment of private educational options – both religious and secular – by allocating far less money per pupil than the State is willing to spend on publicly run secular schooling. And even among private schools, sectarian institutions receive less favorable treatment through their exclusion from eligibility for the Community Schools program – which provides secular schools a better funded and competitive means of attracting Cleveland students than the voucher program provides to religious schools. That the voucher program finally lets religious institutions sit at the table of publicly funded educational alternatives – albeit on terms worse than are available to most secular institutions – is neither improper advancement nor endorsement of religious institutions; it is merely one step on the path toward the neutral treatment of religion that the religion clauses of the First Amendment command.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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